82-1955

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

CHARLES GAVIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, No. 81-5295, entered in the above-entitled case on April 14, 1983.

QUESTIONS PRESENTED

I. Whether a court's refusal to permit a criminal defendant to cross-examine a witness called by a co-defendant concerning the witness' true name and places of residence and employment constitutes a denial of the defendant's Sixth Amendment right to confront the witnesses against him.

II. Whether the Speedy Trial Act, 18 U.S.C. §3161, et seq., is triggered by a warrantless federal arrest following which no complaint is filed.

LIST OF PARTIES IN COURT OF APPEALS

Appellants

Raul Felix Chinea

Charles Gavin (Petitioner)

Victor Varella

Appellee

United States of America

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OPINION BELOW

The opinion of the Court of Appeals, sub nom. United States v. Varella, as supplemented on denial of rehearing, is reported at 692 F.2d 1352. No opinion was rendered by the United States District Court for the Southern District of Florida.

JURISDICTION

The judgment of conviction of the United States District Court for the Southern District of Florida was affirmed by judgment of the United States Court of Appeals for the Eleventh Circuit dated December 6, 1982 and entered April 14, 1983. A petition for rehearing and suggestion of en banc consideration was filed by Petitioner on December 21, 1982. Rehearing was denied on March 31, 1983. Rehearing

en banc was denied on April 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

This case involves the Sixth Amendment to the United States Constitution reprinted in Appendix E to this petition. It also involves 18 U.S.C. §§3161 and 3162, reprinted in Appendix F to this petition, and Fed. R. Crim. P. 5(a), reprinted in Appendix G.

STATEMENT OF THE CASE

References to the Record will be designated as (R-___), to the transcript of preliminary hearings as (TP-___) and to the trial transcript as (T-___).

Petitioner was convicted of violations of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846. The United States District Court for the Southern District of Florida had jurisdiction of this case under 18 U.S.C. §3231.

In early April of 1980, Agent Charles Martinez of the Drug Enforcement Administration, while acting in an undercover capacity, made arrangement with certain individuals in the Miami, Florida area to fly a planeload of marihuana from Haiti to Florida. Martinez made arrangements for two undercover operatives or informants to serve as his crew on the flight. These men were not regular DEA employees, but had worked as informants for the agency in the past. They were introduced by Martinez to

the other individuals as Joe Collins and Tom Burke, although these were not their true names. On April 20, 1980, Martinez, "Joe Collins" and "Tom Burke" flew a DC-6 aircraft loaded with marihuana from Haiti to a remote cattle pasture in the central part of Florida. A number of persons were present at the pasture when the plane landed, including some who loaded the cargo into trucks. Martinez later testified that Petitioner was standing on the perimeter of the pasture as a guard.

DEA agents followed the trucks into Orlando, Florida, and on the evening of April 20, 1980, DEA agents seized most of the marihuana and the trucks into which it had been loaded. Seven persons including Petitioner

were arrested by DEA agents that evening. (TP-691-697). Petitioner was not then taken before a magistrate nor was he charged by complaint. Instead he was taken to the Orange County (Florida) jail where he was booked, fingerprinted and photographed by federal agents. He was then released. (TP-707).

On August 6, 1980, Petitioner and others were indicted by a federal grand jury for various offenses arising out of the smuggling operation. Petitioner was rearrested on August 13, 1980, appeared before a magistrate on August 14, and was arraigned on August 21.

On September 3, 1980 a superseding indictment was returned by a grand jury of the United States District

court for the Southern District of Florida. Twenty-one persons, including Petitioner, were charged by this indictment with offenses arising out of the smuggling operation. Petitioner was charged: 1) in Count III with conspiracy to possess marihuana with intent to distribute, in violation of 21 U.S.C. §846; and 2) in Count IV with possessing marihuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1). (R-51). Petitioner was arraigned on the two counts of the superseding indictment on September 16, 1980.

On September 24, 1980 Petitioner moved to dismiss the indictment on the grounds that he was not indicted within 30 days of his April 20, 1980 arrest as required by 18 U.S.C.

§3161(b). This motion was denied by a United States Magistrate on October 9, 1980. (R-118). An appeal of this order to a United States District Judge was denied on December 16, 1980.

Prior to trial the Government, pursuant to order of the district court, permitted Petitioner and his co-defendants to interview "Joe Collins" and "Tom Burke." At trial a co-defendant (Sarmiento) called "Joe Collins" and "Tom Burke" to testify. (T-2503,2598). Upon objection of the Government, the court refused to permit Sarmiento's counsel to inquire as to the witnesses' true names, residence addresses, or places of employment. (T-2505). Counsel for Petitioner also objected to this

restriction upon questioning, on the grounds that it violated the Fifth and Sixth Amendments, but this objection was overruled. (T-2507). On cross-examination counsel for Petitioner asked "Joe Collins" his place of residence, the location of various businesses which he owned, and the location of property which he owned, but objections to these questions were sustained. (T-2755-2757). The witness did reveal that he resided in the State of Mississippi. (T-2757). Pertinent portions of the transcript are reprinted as Appendix H.

On February 14, 1981, the jury found Petitioner guilty of both counts. (R-210). Judgment of conviction was entered on April 1, 1981. (R-229).

Petitioner filed a notice of appeal on April 19, 1981. (R-234).

REASONS FOR GRANTING THE WRIT

I. A COURT'S REFUSAL TO PERMIT A CRIMINAL DEFENDANT TO CROSS EXAMINE A WITNESS CALLED BY A CO-DEFENDANT CONCERNING THE WITNESS' TRUE NAME AND PLACES OF RESIDENCE AND EMPLOYMENT CONSTITUTES A DENIAL OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The decision of the Court of Appeals for the Eleventh Circuit raises far reaching questions concerning the application of the decisions of this Court in Roviaro v. United States, 353 U.S. 53 (1957), and Smith v. State of Illinois, 390 U.S. 129 (1968). By holding that under certain circumstances a criminal defendant may not question a witness concerning his

name, occupation, home and business address, the Court of Appeals has taken the Roviaro standards regarding the discovery of the identity of confidential informants and engrafted them as an exception upon a defendant's right to cross-examine witnesses who testify at his trial.

Even if such a restriction upon the right of cross-examination ever could be proper, the Court of Appeals has sanctioned it merely on the basis of an assumed danger to the witnesses based upon the nature of the witnesses' role in the case and the fact that the charges involved a drug smuggling scheme. No showing of an actual threat to the safety of the witnesses was required.

The Court of Appeals did not address the effect of this Court's decision in Smith v. State of Illinois, supra, on this case. This case involves a restriction upon the cross-examination of witnesses called by a co-defendant whereas Smith involved the propriety of prohibiting a defendant's inquiry into the true name of a witness called by the prosecution. A subsidiary question therefore arises as to whether the fact that a witness was called by a co-defendant rather than the prosecution affects a defendant's right to cross-examine him. It is Petitioner's position that there should be no such distinction. Cf., Chambers v. Mississippi, 410 U.S. 284 (1973).

The Government without question has a strong interest in the protection of persons who have assisted it in the investigation or exposure of crime. In some instances a fear for the safety of such persons as a result of such assistance may be well founded. This governmental interest may be furthered by preventing disclosure of the informant's identity or places of residence or employment. Yet at some point this interest must yield to a defendant's right to cross-examine the witnesses testifying against him. It is Petitioner's position that this interest yields to the defendant's right to cross-examine at the moment that person ceases being a mere informant and becomes a witness at defendant's trial. The Court of Appeals,

however, has held that even after an informant has become a witness at trial, the trial court may employ a balancing of the factors stated in Roviaro to determine whether questions which might reveal the witness' identity must be answered. No showing of an actual threat to the witness was required prior to the application of the balancing test.

If the decision of the Court of Appeals is allowed to stand, there may be no bar to its application to witnesses called by the Government if the same standards are to be applied to those witnesses as to witnesses called by a co-defendant. The decision therefore has implications extending far beyond the facts of this case.

II. THE SPEEDY TRIAL ACT, 18 U.S.C. §3161, ET SEQ., IS TRIGGERED BY A WARRANTLESS FEDERAL ARREST FOLLOWING WHICH NO COMPLAINT IS FILED.

This question involves a construction of 18 U.S.C. §§3161(b) and 3162-(a)(1), which are reprinted in full in Appendix F. The Court of Appeals held that the word "arrest" as used in Section 3161(b) refers only to an arrest "where the person is charged with an offense." 692 F.2d at 1358. Section 3161(b) provides, in pertinent part, as follows:

> Any indictment or information charging an individual with an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

The Court of Appeals reasoned that since Section 3162(a)(1) refers to an "individual against whom a complaint is filed charging such individual with an offense," the sanctions provided for in that statute are not applicable when an individual has been released after arrest without the filing of a complaint. The Court of Appeals relied upon the decision of the Eighth Circuit in United States v. Solomon, 679 F.2d 1246 (8th Cir. 1982), in reaching this result. The Solomon court had reached the same result.

In adopting the provisions in question, Congress may very well have contemplated that there would be no situations arising in which a federal arrest would be made without the filing

of a complaint. Fed. R. Crim. P. 5(a), reprinted as Appendix G, provides that an officer making an arrest shall take the arrested person before a federal magistrate, and that a complaint shall be filed forthwith. The result of the decision of the Court of Apepals in this case and that of the Eighth Circuit in Solomon is that the Government may avoid the requirements of Section 3161(b) by violating Rule 5(a). It is Petitioner's contention that this is not a proper construction of the Speedy Trial Act, and that the sanctions of Section 3162(a)(1) should be applicable to untimely indictments when no complaint has been filed following a warrantless arrest.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald A. Lykkebak, hereby certify that on this 31 day of May, 1983, three copies of the foregoing Petition for a Writ of Certiorari were furnished by mail, correct postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor VARELLA, Charles Gavin and
Raul Felix Chinea,
Defendants-Appellants.

No. 81-5295.

United States Court of Appeals,
Eleventh Circuit.

Dec. 6, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY, TJOFLAT and FAY, Circuit Judges.

FAY, Circuit Judge:

We are called upon to decide the appeals of three criminal defendants convicted after a jury trial in the Southern District of Florida of conspiracy to distribute and import marijuana, possession with intent

to distribute marijuana, and importation of marijuana, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, 21 U.S.C. § 952(a), and 21 U.S.C. § 963 (West 1976). The appellants raise several overlapping and individual points concerning denial of motions for severance, limiting cross-examination of government informants, speedy trial violations, and admission of hearsay statements under Fed.R. Evid. 801(d)(2)(E). After careful consideration, we reject all of the appellants' contentions and affirm the district court.

Background

The uncontroverted facts of this case establish that appellants Chinea, Varella, and others agreed to import

a large quantity of marijuana from Haiti. On April 3, 1980, co-conspirator Morris Kessler met with Charles Martinez, a trained pilot, to discuss the group's need for a pilot to fly a DC-6 loaded with marijuana from Haiti to the United States. Kessler did not know Martinez was an undercover agent for the Drug Enforcement Administration (DEA). Agent Martinez accepted the job and later met with appellants Varella and Chinea, and other co-conspirators to discuss plans for the importation scheme. On April 20, 1980, agent Martinez, accompanied by two government informants acting as his flight crew, flew the DC-6 with its marijuana cargo to the off-load site in Leesburg, Florida. The marijuana was off-loaded into trucks.

Appellant Gavin, later identified as one of the individuals who stood guard during the off-loading, drove appellant Chinea, agent Martinez and his two crew members, and two other co-conspirators to an Orlando hotel.

The entire off-load operation was surveilled by DEA agents from the ground and air. The various trucks were followed by surveillance teams from the landing site and subsequently seized. Several persons were arrested that evening and all but a small quantity of marijuana was impounded.

Agent Martinez continued to act in an undercover capacity when on April 23, 1980, he met with co-conspirator Kessler in Miami to discuss the loss of marijuana. On the next day, April 24, 1980, agent Martinez

a large quantity of marijuana from Haiti. On April 3, 1980, co-conspirator Morris Kessler met with Charles Martinez, a trained pilot, to discuss the group's need for a pilot to fly a DC-6 loaded with marijuana from Haiti to the United States. Kessler did not know Martinez was an undercover agent for the Drug Enforcement Administration (DEA). Agent Martinez accepted the job and later met with appellants Varella and Chinea, and other co-conspirators to discuss plans for the importation scheme. On April 20, 1980, agent Martinez, accompanied by two government informants acting as his flight crew, flew the DC-6 with its marijuana cargo to the off-load site in Leesburg, Florida. The marijuana was off-loaded into trucks.

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Agent Martinez continued to act in an undercover capacity when on April 23, 1980, he met with co-conspirator Kessler in Miami to discuss the loss of marijuana. On the next day, April 24, 1980, agent Martinez

met with appellant Varella and several other co-defendants to discuss the events of April 20. Agent Martinez described to them what transpired in Haiti and Orlando. Appellant Varella described the off-loading in Orlando. Appellant Varella also told several of the co-conspirators that the trucks had been seized and the authorities knew where the group's stash houses were located. They then discussed who would be financially responsible for the loss, and whether they would also be liable for the lost profit as well as the cost of the marijuana. Doubts were expressed about the actual seizure of the contraband by the police since there had been no newspaper accounts. These discussions resumed at a final meeting

on May 5, 1980, when appellants Chinea and Varella and Martinez discussed who was responsible and most able to bear the nearly two million dollar loss. The trio also discussed the possibility of another importation to recover some of the loss.

Limitation on Cross-Examination

Appellants Gavin, Chinea, and Varella complain that their sixth amendment rights to confrontation were violated when the district court limited their cross-examination of the two confidential informants who served as agent Martinez's flight crew. The court sustained the government's objections to certain questions concerning the informants' names, occupations, home and business address-

es, and names of cases in which they had previously testified. The appellants maintain that this background information was necessary in order to place the witnesses in their proper setting, so that their credibility and motive to testify could be tested.

Cross-examination constitutes a vital component of the sixth amendment right of a criminal defendant to confront witnesses against him. United States v. Berkowitz, 662 F.2d 1127, 1138 (5th Cir. 1981). And, the right to cross-examine a witness effectively includes a sufficient "opportunity to place the witness in his proper setting." Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931). This opportunity, however, is not

unlimited, and the extent of cross-examination is committed to the sound discretion of the trial court. Id., 282 U.S. at 694, 51 S.Ct. 77. "A well-recognized limitation on the right to cross-examine a witness occurs when a disclosure of the information sought would endanger the physical safety of the witness or his family." United States v. Contreras, 602 F.2d 1237, 1239 (5th Cir.1979), citing Smith v. Illinois, 390 U.S. 129, 133, 88 S.Ct. 748, 750-751, 19 L.Ed.2d 956 (1968) (White, J., concurring); United States v. Hansen, 569 F.2d 406 (5th Cir.1978).

The Supreme Court's decision in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) is the leading case on the scope of

the government privilege to withhold from disclosure the identity of persons who furnish information of violations of the law to officers charged with enforcement of the law. In that case, the Court ordered disclosure of the identity of an informant who was an active participant in an illegal drug transaction. The test outlined in Roviaro remains the guide for our decisions today:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure

> erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

We have been called upon repeatedly to consider the balance enunciated in Roviaro. An analysis of the case law reveals that a factor of primary importance in striking that balance is the degree of participation exercised by the informant. See, e.g., United States v. Ayala, 643 F.2d 244, 246 (5th Cir. 1981); United States v. Gonzales, 606 F.2d 70, 75 (5th Cir.1980); Alvarez v. United States, 525 F.2d 980, 982 (5th Cir.1976). When the confidential informant is

not "an active participant in the criminal activity, but only a tipster, disclosure of the identity is not required. . . ." United States v. Moreno, 588 F.2d 490, 494 (5th Cir. 1979). "Thus, even though an informant is present during a critical transaction, the fact that he does not actively participate favors nondisclosure." United States v. Gonzales, at 75. Conversely, where an informer has played a crucial role in the alleged criminal transaction, then disclosure and production of the informer are required to ensure a fair trial. See, e.g., United States v. Jiminez-Serrato, 451 F.2d 523, 526 (5th Cir. 1971) (informer was the only participant in transaction who could establish defendant's mens rea). And,

in cases where there exists a slight possibility that the defendant might benefit from disclosure, although the informant is more than a mere tipster in the criminal transaction, the law favors nondisclosure where the government can demonstrate a compelling need to protect its informer. United States v. Fischer, 531 F.2d 783, 787 (5th Cir.1976).

Turning to the instant case, "our first task is to evaluate the important consideration of the extent of the confidential informant's participation in the criminal activity." United States v. Diaz, 655 F.2d at 588, citing Suarez v. United States, 582 F.2d 1007, 1011 (5th Cir.1978); United States v. Fischer, 531 F.2d 783, 787 (5th Cir.1976). As this

Court noted in United States v. Ayala, "the more active the participation the greater the need for identification." 643 F.2d at 246. While the informants here certainly were more than mere "tipsters," their involvement in this drug transaction was not as integral participants. Rather, we consider their participation to have been nothing more than assisting agent Martinez in flying the DC-6 from Haiti to the United States. Other than assisting in the operation of the aircraft, "the informant[s]' role[s] became that of . . . observer[s] while the negotiations were conducted around [them]. When an informant's level of involvement in the criminal activity is that of minimal participation, this factor by

itself will not compel disclosure." Diaz, 655 F.2d at 588. Further, the appellants have failed to establish sufficiently the importance of the informers' testimony so as to compel disclosure. Although one or both were present during certain meetings and the offloading of the marijuana, the informers were not asked, either on direct or cross-examination, any particulars about the discussions, activities, or persons involved in the meetings among the conspirators. They were examined extensively about the amount and the packaging of the cash payments, but not about who, besides agent Martinez, was present during the payoffs. Nor were they questioned about any of the codefendants' participation in the smuggling

venture. Rather, the inquiry overwhelmingly focused on collateral matters related solely to their credibility, as opposed to focusing on their observation of or participation in the charged events.

Viewing this record[1] and consider-

1. The very able trial judge in the instant case, utilizing the in camera procedure specifically endorsed by this court in United States v. Freund, 525 F.2d 873 (5th Cir.1976), aff'd following remand, 532 F.2d 501 (5th Cir.1976), interviewed both informants and concluded that disclosure was unwarranted. A transcript of the in camera proceeding does not appear in the record. Although we know the government's objections to disclosure were grounded on concerns for the physical safety of the informants, we do not know what information was disclosed to the trial judge during his in camera interviews with the informants. "In such circumstances, we assume that the trial court's findings are supported by the evidence and its conclusions are in accord with such cases as Roviaro

ing the overall role of these informants as related to the activities of the defendants, we find no error.

Right to Speedy Trial Claim

Appellant Gavin contends that the district court erred in denying his motion to dismiss the indictment since the government violated his right to a speedy trial under the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161, et seq. (1976) (the "Act"), and under the sixth amendment to the United States Constitution.[2]

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v. United States; Suarez v. United States, 582 F.2d 1007 (5th Cir. 1978);]" United States v. Smaldone, 583 F.2d 1129, 1133 (10th Cir.1978).

2. Fed.R.Crim.P. 48(b) permits a district court to dismiss an indictment if there is any unnecessary delay in bringing a defendant to trial. "However, dismissal under Rule 48(b) is not required unless the constitutional speedy trial

The Act primarily focuses on two time periods in the criminal process. The first is from arrest or service with a summons to the filing of an indictment or information. 18 U.S.C. § 3161(b). The second is from the filing of the indictment or information to the commencement of trial. 18 U.S.C. § 3161(c)(1). Appellant Gavin's first speedy trial claim concerns the pre-indictment period.

Section 3161(b) provides,

> [a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual

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right has been flouted." United States v. Hill, 622 F.2d 900, 908 (5th Cir.1980).

was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

Section 3162 outlines the sanctions or remedies that are to be utilized if the Act is violated. Section 3162(a)(1) states,

> [i]f, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section

3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

Appellant Gavin was arrested on probable cause without a warrant on April 20, 1980. However, no

complaint or formal proceedings were filed at that time, and he was released after booking procedures were completed. The appellant was re-arrested on August 13, 1980, after the indictment was returned. A superseding indictment was returned on September 3, 1980, approximately four and one half months after the initial arrest. The appellant claims that the thirty-day arrest-to-indictment time limit of § 3161(b) was thus violated.

The government argues that the "informal" and warrantless arrest of April 20 did not trigger the time limit provision of § 3161(b). It argues that the Speedy Trial Act clock began to run on August 13, the date of the formal arrest. The government asserts that "arrest" in § 3161(b)

means a formal arrest upon a judicial determination of probable cause and upon the filing of formal charges against the defendant. The September 3 indictment would then have occurred within the thirty-day limit of § 3161-(b).

The Eighth Circuit has recently examined this statutory scheme and concluded that "the term 'arrest' in § 3161(b) of the Act must be construed as an arrest where the person is charged with an offense.'" United States v. Solomon, 679 F.2d 1246, 1251 (8th Cir.1982), quoting United States v. Jones, 676 F.2d 327, 331 (8th Cir.1982). The Solomon court reasoned,

> [i]t is clear that remedial section 3162(a)(1) is not applica-

ble to this case. It states, 'in the case of any individual against whom a complaint is filed charging such individual with an offense' and where the indictment is not timely filed within the meaning of section 3161(b) 'such charge . . . contained in such complaint shall be dismissed or otherwise dropped.' Section 3162(a)(1) does not state that it is applicable to the case where there is an arrest but no complaint is filed and no charges made. The [district court in United States v. Padro, 508 F.Supp. 184 (D.Del.1981) relied] on this observation to conclude that an arrest based upon the mere opinion of a police

officer is not sufficient to trigger the Act's time limits. The court stated, '[i]t is only when a charge is leveled against a defendant based upon a finding of probable cause by a judicial officer that the time limitation of section 3161(b) is relevant.' United States v. Padro, supra, 508 F.Supp. at 185.

Section 3161(b) by its own terms refers to arrest without the qualification that formal charges need be filed. The Padro court is correct when it implicitly recognizes that the remedy provided in section 3162(a)(1) is not relevant to an arrest without a complaint. The statute thus has a gap in its remedial

> provisions. It clearly sets out the applicable provision for violation of the time limits concerning complaint to indictment or information, and indictment or information to commencement of trial. But it does not specify what the remedy shall be if section 3161(b) is violated and only an arrest has occurred and no charges have been filed.

Id. at 1252 (emphasis in original).[3]

The Solomon court relied on United States v. Jones, 676 F.2d 327 (8th

3. "It has been observed that the Speedy Trial Act contains 'numerous unresolved policy issues, ambiguities, and drafting errors.'" Solomon at 1252, n. 11, quoting United States v. Mulherin, 521 F.Supp. 824, 826 (S.D.Ga.1981) (quoting Frase, The Speedy Trial Act of 1974, 43 U.Chi.L.Rev. 667, 696-97 (1976).

Cir.1982). In Jones, after reviewing the Act, its legislative history, and case law, a panel of the Eighth Circuit concluded that the "term 'arrest' in section 3161(b) of the Act must be construed as an arrest where the person is charged with an offense." Id. at 331. The Jones court concluded that the protections of the Act and the sixth amendment right to a speedy trial are concurrent in this respect. Id., at 331. See United States v. McDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). We agree with this reasoning. Thus, in the case at bar, the Act's thirty-day time period contained in § 3161(b) did not begin to run until August 13, the date appellant Gavin was arrested and formal charges were filed against

him.[4] The indictment was filed on September 3, well within the thirty-day period.

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4. The appellant argues that even though he was released and no complaint was issued, his arrest on April 20 constituted a formal initiation of criminal proceedings as contemplated by the Act, since it was his right pursuant to Fed.R. Crim.P. 5 to be taken before a magistrate and be presented thereafter with a complaint based upon probable cause. Appellant Gavin's brief at 33. Although Rule 5 requires an arrested person be taken before a magistrate "without unnecessary delay" and a complaint filed in the event of a warrantless arrest, "[n]othing in Rule 5 . . . precludes the outright release of a person shortly after the arrest as was the case here." Jones at 331. As emphasized by the Second Circuit in United States v. Hillegas, 578 F.2d 453 (2nd Cir.1978), the "'policy and purpose' of the [Speedy Trial] Act . . . [has] been to expedite the processing of pending criminal proceedings, not to supervise the exercise by a prosecutor of his investigative or prosecutorial discretion at a time when no criminal proceeding is pending before the court." Id. at 456 (emphasis in original).

Appellant Gavin also contends that his statutory right to a speedy trial was impaired by the delay occasioned by joinder with his codefendants, some of whom were not immediately apprehended or had pending pretrial motions. During the four-month delay between the appellant's arraignment and the commencement of his trial, the various pretrial motions of his codefendants were resolved.[5] Most of

5. Section 3161 (c)(1) of the Act requires a defendant to be brought to trial within seventy days from the filing of his indictment or from the date the defendant has appeared before a judicial officer, whichever date occurs last. In this case, the operative date to commence the running of the seventy-day period is August 14, 1980, the date that the appellant was first arraigned. The jury trial commenced January 16, 1981.

this time is excluded from the appellant's Speedy Trial Act computation under 18 U.S.C. § 3161(h)(7), which excludes from the time limits of the Act "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Appellant Gavin does not dispute the propriety of delay as to those defendants whose motions were pending, but argues, despite the clear exclusionary language of § 3161(h)(7), that the district court abused its discretion in denying his motions for severance to allow his trial to proceed more speedily. We disagree.

The primary purpose of the Speedy Trial Act is to accelerate criminal

trials. Congress recognized the utility of multi-defendant trials to effectuate the prompt efficient disposition of criminal justice. It felt that the efficiency and economy of joint trials far outweighed the desirability of granting a severance where the criterion was simply the passage of time. Proposed Amendments to the Ervin Bill: Hearings on S. 895, 92nd Cong., 1st Sess. (1971) (letter to Senator Ervin from Assistant Attorney General William H. Rehnquist). Congress feared that rigid statutory time limits would force courts to disregard the principle of "judicial efficiency;" courts would be forced to "grant severances unnecessarily in multi-defendant cases 'so that a defendant whose case was moving

slowly would not hold up the trial of his codefendants.'" S.Rep.No. 93-1021, 93rd Cong., 2d Sess. (1974). "In multiple defendant cases, such as major narcotic conspiracies, judges may be forced to grant severances which would otherwise not be required. This in turn would lead to more trials and more congestion." Hearings on the 1972 Senate Subcommittee Bill, S. 754, 93rd Cong., 1st Sess. (1972) (Testimony of Deputy Attorney General Joseph T. Sneed). Thus, reasonable delay in multi-defendant cases was specifically provided for by 18 U.S.C. § 3161(h)(7). Congress stressed that "the purpose of the provision is to make sure that [the Speedy Trial Act] does not alter the present rules on severance of codefendants by forcing

the [g]overnment to prosecute the first defendant separately or to be subject to a speedy trial dismissal motion under section 3162." S.Rep.No. 93-1021, 93rd Cong., 2nd Sess. (1974). The express exclusionary command of § 3161(h)(7) and the congressional guidance gleaned from its legislative history refutes the appellant's contention that the district court abused its discretion in denying his motions for severance. The appellant's statutory right to a speedy trial was not violated by the four-month pretrial delay.

A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only by a balancing test in which the conduct of

the prosecution and that of the defendant are weighed. The United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101, outlined the factors to be considered: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertions of his right; and (4) the prejudice to the defendant. "The first prong of Barker, the length of the delay, is the threshold 'triggering mechanism.' No inquiry into the other factors is required unless there has been a delay of such length as to be 'presumptively prejudicial.'" United States v. Edwards, 577 F.2d 883, 888 (5th Cir.1978), citing Barker, 407 U.S. at 530, 92 S.Ct. 2182. In this case, the four-month delay cannot

be considered "presumptively prejudicial," so as to even trigger the balancing and require an examination of the other three factors. United States v. Avalos, 541 F.2d 1100 (5th Cir. 1976); Barker v. Wingo, 407 U.S. at 531, 92 S.Ct. at 2192. We note that delays longer than that involved here have been held not to constitute sixth amendment violations. See United States v. Burns, 662 F.2d 1378, 1384 (11th Cir.1981) (twelve-month delay); United States v. Elorduy, 612 F.2d 986, 988 (5th Cir.1980) ("no prejudice actually or presumptively resulted from [a five-month] delay"); United States v. Rankin, 572 F.2d 503, 505 (5th Cir.1978) ("A seven-month delay is not presumptively prejudicial. . . ."); United States v. Maizumi,

526 F.2d 848, 851 (5th Cir.1976) ("The [ten-month] delay per se was not unreasonably long"). Even if we considered the other factors, appellant Gavin has not alleged any prejudice resulting from the pretrial delay. In the absence of a showing that he suffered some particular injury, such as lost evidence or prolonged pretrial incarceration, "we must presume that [appellant Gavin] relies on the anxiety inherent in any delay. Standing alone, however, this form of prejudice is insufficient to warrant reversal." United States v. Hill, 622 F.2d 900, 910 (5th Cir.1980); United States v. Wilson, 657 F.2d 755, 767 (5th Cir.1981); United States v. Greer, 655 F.2d 51, 53 (5th Cir.1981); United States v. Noll, 600 F.2d 1123, 1127-28

(5th Cir.1979). The district court did not err by declining to dismiss the indictment either pursuant to the sixth amendment or pursuant to the Speedy Trial Act.

Denial of Severance

The point pressed most strenuously on appeal by appellant Chinea is that the district court committed reversible error in failing to grant one or more of his motions for severance. Appellant Chinea does not argue that joinder was improper under Fed.R. Crim.P. 8(b). The appellant instead claims that he was prejudiced by the joint trial and entitled to relief under Fed.R.Crim.P. 14.[6]

6. Fed.R.Crim.P. 14 provides, in pertinent part:
If it appears that a defendant . . . is prejudiced by a joinder

Under Rule 14, the decision to grant a severance is committed to the sound discretion of the district court, and an appeallant must show that a denial of severance resulted in specific and compelling prejudice in order to obtain reversal. As we recently observed in United States v. Lippner, 676 F.2d 456, 464 (11th Cir.1982):

> Both the Eleventh and former Fifth Circuits repeatedly have observed that a severance under Rule 14 is discretionary with the trial judge. As this court recently stated:

> . . . of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Our analysis of this claim must begin with the accepted principle that defendants jointly indicted should be so tried. United States v. Sullivan, 578 F.2d 121, 123 (5th Cir.1978). An exception to this rule may be enforced where such joinder would cause the defendant undue prejudice. F.R.Cr.P. 14. In determining a motion for severance brought on such grounds, the trial judge is empowered to exercise sound discretion in balancing possible prejudice to the defendant against governmental concern for judicial economy. United States v. Staller, 616 F.2d 1284, 1294 (5th Cir.

1980). Inherent in every joint trial is, of necessity, some degree of bias. Only in the event such prejudice appears to be compelling does severance become warranted. United States v. Perez, 489 F.2d 51, 65 (5th Cir.1973).

The following test for assessing the existence of "compelling prejudice" has been adopted by this circuit:

> '[w]hether under all circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the inde-

pendent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.'

Tillman v. United States, 406 F.2d 930, 935 (5th Cir.1969) (citing Peterson v. United States, 344 F.2d 419, 422 (5th Cir.1965)). See also United States v. Zicree, 605 F.2d 1381, 1388-89 (5th Cir. 1979). United States v. Brock, 669 F.2d 655, 660 (11th Cir. 1982) (footnote omitted). See

United States v. Thevis, 665 F.2d 616, 647 (5th Cir.1982); United States v. Welch, 656 F.2d 1039, 1053 (5th Cir. 1981).

Specifically, appellant Chinea contends that he should have been tried separately from appellant Varella because of their mutually antagonistic defenses. At trial both appellants did in fact assert antagonistic, albeit similar defenses. Each attempted to minimize his own involvement, and denied knowingly participating in the conspiracy. Each one described his limited role as one of assisting the other codefendant by performing specific tasks without knowledge of the ultimate purpose of the other's illegal efforts. These allegations, however, were refuted by the evidence

adduced at trial. There it was established that appellants Chinea and Varella were both instrumental in planning the importation and distribution scheme. Together they met with agent Martinez and discussed the smuggling plans, including timing, location of the landing field, and payment to the crew. In short, the government demonstrated that both men participated together, as well as individually, in the crucial events arising throughout the course of the conspiracy. Thus appellant Chinea's assertion that he was acting simply as an unknowledgeable subordinate and assistant to codefendant Varella was totally unfounded. Moreover, this trial was not so difficult or complex that the jury could not have properly differ-

entiated the evidence as to each individual defendant. We hold, therefore, that the district court did not abuse its discretion in denying appellant Chinea's severance motions.[7]

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7. In our recent decision in United States v. Berkowitz, 662 F.2d 1127 (5th Cir.1982) we held that "a mere showing of some antagonism and prejudice [from a joint trial] is insufficient to require overturning a denial of severance by the district court . . . In this circuit, to compel severance the defenses must be more than merely antagonistic--they must be antagonistic to the point of being mutually exclusive. Id. at 1133. Recognizing that the test for when antagonistic defenses are irreconcilable or mutually exclusive has been expressed in various forms, we prescribed the test to be applied in this circuit:

> [W]e hold that the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf

Appellant Chinea also contends that the district judge erred in denying him the opportunity to rebut certain prejudicial comments made by

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of his co-defendant . . . This sort of conflict between defendants creates the compelling prejudice that mandates severance. Such compelling prejudice does not arise with respect to a defendant where the conflict concerns only minor or peripheral matters which are not at the core of his defense. Ultimately, the test is whether the defendant received a fair trial.

Id. at 1133-34. In Berkowitz, we found that antagonistic defenses asserted by two codefendants, which were very similar to the trial defenses asserted by appellants Chinea and Varella, were not mutually exclusive. There, "each defendant attempted to minimize his own involvement, and denied joining or participating in the [drug] conspiracy. Each one described his role as simply making an initial introduction and cast the other as the more active participant." Id. at 1132. Finding that these antagonistic defenses did not compel severance, we reasoned,

> the essence or core of each defendant's defense--noninvolve-

codefendants in their closing arguments. We find no abuse of discretion by the district judge in this ruling.

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ment in the criminal activity--was not in conflict, and indeed could be construed to be quite consistent, i.e., neither were criminally involved. Although the defendants concededly disagree on some details, neither defendant's defense required the jury to find the other guilty. Nor was it necessary for the jury, in order to believe the core of testimony offered on behalf of one defendant, to disbelieve testimony offered on behalf of the other defendant. The jury, if it chose to discredit the government's case, could have concluded that Vafaie's involvement ended with giving his telephone number to confidential informant Nieves and that Van Coughnett's conduct was similarly limited to making an initial introduction, so that neither had the intent to join in the conspiracy alleged in the indictment. Considering the testimony offered by each defendant, the jury rationally could have accepted the defense theory of both, of only one, or of neither. We cannot say that we are left with a definite

Admission of Evidence

Agent Martinez gave extensive testimony regarding incriminating statements made by several conspirators following their arrest and seizure of the marijuana on April 20, 1980. The district court admitted this testimony on the ground that the post-April 20 statements were made in furtherance of a joint venture involving the three appellants. See Fed.R.Evid. 801(d)(2)(E); Krulewitch v. United States, 336 U.S. 440, 443-44, 69 S.Ct.

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and firm conviction that the district court abused its discretion.

Id.

In our finding that appellants Chinea and Varella's trial defenses were unsupported by the evidence, we are equally certain that the court's holding and rationale in Berkowitz is dispositive of appellant Chinea's severance claim.

716, 718-719, 93 L.Ed. 790 (1949). The appellants argue, however, that the district court erred in admitting the agent's testimony since the joint venture had terminated on April 20 when several codefendants were arrested and the marijuana was seized. We disagree.

The duration and termination of a conspiracy is determined by the particular facts of each case. United States v. Hickey, 596 F.2d 1082, 1089-90 (1st Cir.1979); United States v. Knuckles, 581 F.2d 305, 313 (2nd Cir. 1978). Here, the district court heard extensive testimony about the continuing efforts of the conspirators to find out what happened to their marijuana. For over one week after the April 20 debacle they debated whether

the government had in fact effected the arrests and seizure. They also met to discuss how to minimize their losses, including the possibility that agent Martinez could try to recover the abandoned plane. They also debated the apportionment of the loss and possible recovery through another importation. This evidence clearly demonstrated the continuing plan of the conspiracy. United States v. Celaya-Garcia, 583 F.2d 210, 212 (5th Cir.1978), cert. denied, 440 U.S. 946, 99 S.Ct. 1259, 59 L.Ed.2d 481 (1979). Thus the district court properly found that the appellants' joint venture continued past April 20, and that the conspirators' incriminating statements were made in furtherance thereof. Agent Martinez's testimony

recounting such statements was admissible.

Conclusion

We have rejected all the contentions raised in this appeal. The judgments of the district court are AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 81-5295

D.C. Docket No. 80-317-CR-SMA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR VARELLA, CHARLES GAVIN and RAUL FELIX CHINEA,

Defendants-Appellants.

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Appeal from the United States District Court for the Southern District of Florida

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Before RONEY, TJOFLAT and FAY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from

the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

December 6, 1982

ISSUED AS MANDATE: APR 14 1983

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor VARELLA, Charles Gavin and
Raul Felix Chinea,
Defendants-Appellants.

No. 81-5295.

United States Court of Appeals,
Eleventh Circuit.

March 31, 1983.

Appeals from the United States
District Court for the Southern
District of Florida.

ON PETITION FOR REHEARING

(Opinion December 6, 1982, 11 Cir.,
1982, 692 F.2d 1352).

Before RONEY, TJOFLAT and FAY, Circuit Judges.

PER CURIAM:

ORDER ON PETITION FOR REHEARING ADDRESSED TO THE PANEL

The appellant has filed a petition for rehearing addressed to the

panel of the Court which decided this case, and the same is hereby DENIED. For purposes of clarification, however, the opinion issued by the panel is supplemented by the following two additions: 1) the language appearing in the section of the opinion entitled Limitation on Cross Examination is supplemented by adding the following paragraph immediately after the first full paragraph:

> Prior to trial the district court denied all requests concerning disclosure of accurate information regarding identification, home address, etc., but did order that the two witnesses be produced for interviewing by defense counsel. This was done. At trial, counsel for a non-appealing defendant (Jose Antonio Cabrera-

Sarmiento) called these men as witnesses. After a lengthy hearing outside the presence of the jury, the court sustained government objections to the disclosure by the witnesses of any information which might expose them to a high risk of harm. Appellants' cross examination followed that of counsel for Sarmiento. The informants were not called as government witnesses.

2) Footnote 1 is supplemented by adding the following sentence to the existing language:

> Although the court advised counsel that the in camera hearing had been reported and that a transcript would be preserved for appeal, no defendant chose

to provide this court with that portion of the record.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5295

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICTOR VARELLA,
CHARLES GAVIN
and
RAUL FELIX CHINEA,
Defendants-Appellants.

- - - - - - - - -

Appeal from the United States
District Court for the Southern
District of Florida.

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion December 6, 1982, 11 Cir., 1982, ___ F.2d ___).

(April 19, 1983)

Before RONEY, TJOFLAT, and FAY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED. See earlier order supplementing opinion (3/21/83).

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge
Peter T. Fay

REHG-6

APPENDIX E

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

APPENDIX F

Title 18, United States Code

§3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested

or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant

consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment of information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the

same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed

one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal

or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section,

for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit witn respect to the period between arraignment and trial imposed

by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from

any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from

any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or

an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government

pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or

an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the

Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the

defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best

interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of

novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of gener-

al congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged

with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall

cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter

and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution

on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance;

or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connectin with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with

his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing

any counsel or attorney for the Government pursuant to this section.

APPENDIX G

Federal Rules of Criminal Procedure

Rule 5. Initial Appearance before the magistrate

(a) In general. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 USC § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable

cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 USC § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses not triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform

the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant

is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

[2503]

Thereupon--

JOE COLLINS

as identified herein, was called as a witness by the Defendant, and having been first duly sworn, was examined and testified as follows:

THE COURT: Please take the witness stand, sir.

MR. McMASTER: Your Honor, I would just like to remind the Court about the Government's---

MR. HOGAN: I am going to go through the things, and you can object to it and then you can move, your Honor.

I think I am entitled to his name and his address and his job, and I just want to lay a predicate.

THE COURT: Do not answer a question until an objection is made and the Court rules on it, would you?

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MR. HOGAN:

Q Would you state your name, please.

MR. McMASTER: Objection.

MR. HOGAN: At this point I think the

[2504]

Collins - direct

Government has to make a proffer as to why they should feel that the name would endanger him in any way.

MR. McMASTER: Your Honor, I think based on the testimony produced at this particular trial and considering the nature and position of this

particular witness, who is not a Government agent in the sense that he is an armed police officer or law enforcement-type person, but rather a private individual who is not under the protection of the Government, and considering the nature of his involvement, the witness has expressed, and the Government certainly feels it is a legitimate fear for his personal safety if his name, address and actual business address or name is revealed in an open Court.

As I have advised the Court, the witness is willing to state that information to the Court in an in-camera proceeding, and the Government will request that that then be sealed.

THE COURT: Mr. Hogan, would you state why you deem it necessary

to obtain that information and have it available to the jury; namely, the actual correct name of this witness, his residential address and the name of his employer?

MR. HOGAN: And his business.

[2505]

THE COURT: He can tell you what business he is in but not the name of that business.

MR. HOGAN: I want his present address, his business address; I want how long he has been in that community, prior jobs with the Government and prior times that he has worked in an undercover capacity as to the beginning just to set for the jury the surrounding circumstances of this man as to his credibility, as to what type of business he is in, what he

makes, what he does for a living, where he lives, and furthermore, to enable the defendant to investigate to see if he is telling the truth.

THE COURT: If I understand the Government's objection to that, the party of it that I would uphold the objection to is, first, he need not tell his actual or correct name; he need not give his residence address, although he should tell the state in which he lives; he need not identify the name of the business in which he is either employed or owns, but he is to give the nature of the business.

The rest of the questions I do not have any particular difficulty with. I believe, Mr. Hogan you indicated you wanted to get into any past

instances that he had been employed by the Government. I think you have a right to get into it. I do not know that

[2506]

you necessarily want to do that unless you have explored it here first to see what some of the answers may be.

MR. HOGAN: That is correct.

THE COURT: You may get into the background so long as it does not constitute an identification of him.

I will let you explore that to get into his background.

MR. CRAWFORD: Your Honor, if I may, I would like to state for the record an objection on behalf of the defendant Robert Knowles.

Maybe I am somewhat inexperienced in this, I don't know--I have been doing this for ten years--but I have never seen or heard of a witness coming into Court and testifying under oath and not being required to give his name both to the Court and to the defendants to whom he is testifying against. I think it is a violation of both the Fifth and Sixth Amendments of the United States Constitution, and for that reason I object to that procedure, particularly in regard to his name.

THE COURT: Any comment from the Government?

MR. McMASTER: Just the grounds previously

stated, Judge.

I have nothing further to add.

THE COURT: Then I note your objections and I will overrule them, and to the limited extent that I announced.

MR. LYKKEBAK: All defendants join in that objection, of course, your Honor.

I have witnessed this type of proceeding before, and I have also witnessed that conviction reversed. I think that is a terrible denial of our Sixth Amendment right to confrontation, not to know who the witness is that is testifying against us and where he is from, what he does, anything about him. He may be an ax murdered for all we know.

THE COURT: Let the record reflect

the objection. It is overruled.

It is noted, the same objection, for all defendants.

MR. DEAN: Your Honor, I would like to ask that the interpreter be relocated. It is very distracting to have him located immediately behind me.

I would ask that he be located somewhere else in the courtroom. It is very distracting.

THE COURT: Would you two gentlemen go

* * *

[2598]

THE COURT: Please come forward, sir.

THEREUPON:

TOM BURKE

as identified, was called as a witness

and, having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. McMaster?

MR. McMASTER: The Government is going to be making the same objection and same argument with respect to the identity, location and actual job of this particular witness, as we did with the previous witness.

THE COURT: My ruling at this point is going to be the same as it was with regard to the Witness Joe, that pending an in-camera hearing, which I will hold after we have completed this--then I may revise the ruling if I deem it necessary or appropriate to do so under Roviera, but for the time being, the witness need not give his correct last name. He need not give his residence address

and he need not give the name of his business or employment or employer, although he may tell the nature of his business and/or occupation and the state in which he resides.

* * *

[2643]

THE COURT: What I don't recall is whether there was ever a request made of this Court to order or direct either of those two witnesses to either keep, destroy or not keep or not destroy their notes in any way, and I have no recollection that anyone asked me anything.

No one even asked me to include an oral subpoena duces tecum for that matter.

I have no recollection of this Court being asked to do anything with

regard to the notes.

Am I right or wrong?

MR. HOGAN: I don't know, your Honor. I do know the Government misstated it, as to the other confidential informants--I subpoened them on Friday and since I knew his name, the Government said that they would make him available in 48 hours or 24 hours.

MR. MASON: Your Honor, I don't suggest that either one of these lawyers here actively participated in knowing that on January 12th those witnesses were lying.

However, I submit that it is a little bit farfetched to admit here that someone in the Government service didn't know that in addition--in addition that they were, in fact, acting

as agents

[2644]

of the United States Government which, when they flew that plane in and they participated as hired confidential informants for the Government--surely somebody knew what they were doing when they intentionally deceived us, and I submit that they did directly violate Title 18, United States Code, Section 1503, which is a felony under the Federal law to obstruct or impede a criminal investigation; I am an officer of the Court and the rest of us are, and we are asking these questions and then they come in and admit--Mr. Collins admits that he intentionally deceived and lied to deter us from engaging in a criminal investigation

to defend our clients and that is abhorrent to any concept of due process of law, and I think that the only remedy available now is to grant a motion to dismiss.

It is outrageous, and in addition this man comes in and testifies that he might as well put a bag over his head--you might as well put a bag over his head and give him eye holes and let him say whatever he wants to because we can't investigate him and we can't impeach him and we can't test his credibility.

THE COURT: All motions are denied.

All motions are denied; let me finish, Mr. Beeler, please.

[2645]

I do not consider any of them to be based upon a sufficient basis

of law, such that would require them, any of the said motions, either to dismiss or to hold the hearings requested by Mr. Beeler or for mistrial or otherwise necessary to be granted.

Let me make these observations.

First, we do not have here a circumstance in which confidential informants have not been produced. That is quite to the contrary.

Three confidential informants were produced and made available to all defense counsel.

Second, what we have is the opportunity now afforded any defense counsel to cross examine and to test their credibility and to seek to elicit that information that they deem necessary or advisable and which is a proper matter to go before the jury and the

Court will allow flexibility in terms of that inquiry.

[2646]

Third, initially this morning when Joe Collins first testified, the Court did grant the Government's motion not to require disclosure of identification and residence and/or business or occupation, the place of employment.

Subsequently it became apparent both as to Mr. Collins and Mr. Burke, Joe Collins and Tom Burke, that the Court should have considered Riviera versus the United States and the Fifth Circuit offspring of that opinion.

Thereupon during the luncheon recess the Court did conduct separate and individualized in-camera proceedings with regard, first, to Joe Collins

and then separately Tom Burke, and as a result of those individualized and separate in-camera conferences which had been sealed and preserved by the Court reporter's notes, the Court has applied the balancing test with regard to the third category and finds that, in fact, the production of that information should be withheld.

The Court notes that there has been no showing here to this Court how and why that information in and of itself is sufficiently prejudicial to any defendant or prejudicial to all defendants so that it would require any further action by the Court after [2647]

applying the balancing test.

So insofar as the Court is concerned, the right to cross examine,

the right to examine, really, and that's where it is, because the defendants will obviously call the witnesses if they so elect--the Government has already indicated that it does not intend to call them in reference to the fact that notice of intention to call two witnesses may have been served, it would not happen to be the first time when someone has indicated that they may call a witness on either side and doesn't then wind up calling that witness.

I therefore am interested at this point in addressing the issue of what, if any, areas of examination as to Joe Collins and Tom Burke should be considered as possible treatment in a way that would minimize the likelihood of any prejudicial effect on

the jury if requested.

MR. Beeler?

MR. BEELER: Your Honor, the defendant Cabrera moves for relief in the nature of an order finding as fact basically what Mr. Hogan proposed in the stipulation; that is, directing that the defendant's version of the stipulation be taken as the facts in this case; those facts can be presented to the jury in

[2648]

appropriate fashion.

We believe that that is appropriate relief because of the entire record of the case and the unsatisfactory conditions surrounding the production of the informant, the interviewing of the informants, and the various extraordinary circumstances

which make us dependent upon adverse parties, as Mr. Forman--

THE COURT: Each one of those witnesses could refuse to even talk with you folks if they wanted to. They didn't have to talk with any defense counsel.

They were encouraged to do so and the Court instructed Judge Palermo to encourage--to talk with any defense counsel who wanted to do so but, you know, it wasn't absolutely necessary for them to talk with any defense counsel had they not wished to do so.

* * *

[2754]

Collins - cross

* * *

Q. Mr. Collins, your name is

not really Joe Collins, is it?

A. No, sir, it's not.

[2755]

Collins - cross

Q. It's an alias that you are using in court?

A. That's correct.

Q. If I asked you, sir, where you lived, would you tell me where you reside?

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. Where do you live?

MR. HOGAN: Objection.

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. If I asked you what airline do you work for, or worked for for

the past 15 years, you wouldn't tell me that either, would you?

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. Where are these businesses of yours located? Where is your fish business?

MR. FORMAN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. LYKKEBAK:

[2756]

Collins - cross

Q. Where is this oil land that you say you own?

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. Do you have a regular business

or company or business that sells aircraft?

A. As an office space; no.

Q. You just do it out of your bedroom of your house or something?

A. No, I don't do it out of the bedroom of my house.

Q. How do you engage in this enterprise?

A. By buying cheap when people are selling, and selling when people are buying.

Q. Where do you engage in this business?

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. You do the fishing in your fish business yourself?

A. No, I do not.

Q. Do you have other employees working for you?

[2757]

Collins - cross

A. They are not employees. They take the boat and if it makes anything, I get a third of it.

Q. Where is your fishing business?

MR. FORMAN: Objection.

THE COURT: Sustained.

BY MR. LYKKEBAK:

Q. In what state do you reside?

A. Mississippi.

Q. Is that where your domicile is actually located?

A. Where my home is located, you mean?

Q. You live there. Are you a married man?

A. I'm married.

Q. And you live there with your wife?

A. I live with my wife.

Q. Do you own property in Mississippi?

A. Say that again.

Q. Do you own property in Mississippi?

A. I own some in Mississippi; yes.

Q. You own some in other states?

A. Yes.

Q. Where in Mississippi?

MR. FORMAN: Objection.

THE COURT: Sustained.